

VOLUME 2

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

UNITED STATES OF AMERICA,)

PLAINTIFF,)

VS.)

DANIEL DAVID,)

DEFENDANT.)

COPY

NO. CR 02-0062 SI

TUESDAY, MARCH 2, 2004

SAN FRANCISCO, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

KEVIN V. RYAN
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

BY: MATTHEW JACOBS,
MARK C. PARRENT,
ASSISTANT UNITED STATES ATTORNEYS

FOR DEFENDANT:

FOLEY & LARDNER
ONE MARITIME PLAZA, SIXTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

BY: THOMAS F. CARLUCCI, ESQUIRE
RUSSELL L. CARLBERG, ESQUIRE

REPORTED BY:

DIANE E. SKILLMAN, CSR 4909
OFFICIAL COURT REPORTER

1 RECEIVED THE SUM OF \$480,000 -- \$480,756.57. AND THE EVIDENCE
2 WILL BE THAT MR. DAVID AND MR. NISBET WERE TRYING TO GET MORE.

3 NOW, TO UNDERSTAND THE EVIDENCE THAT YOU WILL BE
4 HEARING IN THE CASE, YOU NEED TO KNOW A LITTLE SOMETHING ABOUT
5 HOW PAY TELEPHONES OPERATE. AND JUDGE ILLSTON, DURING THE VOIR
6 DIRE YESTERDAY, SUGGESTED THAT THIS CASE HAD SOMETHING TO DO
7 WITH TELECOMMUNICATIONS. IN FACT, IT DOES. IT HAS TO DO WITH
8 PAY TELEPHONES.

9 IN GENERAL, WE DON'T SPEND A LOT OF TIME THINKING
10 ABOUT PAY TELEPHONES. WE TAKE THEM FOR GRANTED. HOPEFULLY WE
11 CAN FIND ONE WHEN WE NEED ONE. BUT THOSE PAY TELEPHONES ARE
12 OWNED BY PEOPLE. THEY MAY BE OWNED BY THE TELEPHONE COMPANY,
13 PAC BELL, OR THEY MAY BE OWNED BY OTHER PEOPLE WHOSE BUSINESS
14 IS LEGITIMATELY PAY TELEPHONES, AND THOSE ARE INDEPENDENT PAY
15 PHONE PROVIDERS.

16 SO, FOR EXAMPLE, ON THE SECOND FLOOR OF THIS
17 BUILDING DOWN BY THE FEDERAL CAFETERIA AROUND THE SIDE BY THE
18 BATHROOMS THERE IS A BANK OF PAY TELEPHONES.

19 I DON'T KNOW WHO ACTUALLY OWNS THOSE PARTICULAR PAY
20 TELEPHONES, BUT JUST TO TAKE AN EXAMPLE, SOMEBODY OWNS THOSE
21 TELEPHONES. IF YOU WERE TO GO DOWN TO THE SECOND FLOOR AT
22 LUNCH BREAK AND PUT 50 CENTS TO MAKE A CALL, CALL YOUR SPOUSE,
23 SAY, "I CAN'T BELIEVE I GOT STUCK ON THIS JURY," THAT 50 CENTS
24 NOW IS IN THE BOX. AND THAT MONEY WOULD BE SPLIT IN SOME
25 FASHION BETWEEN THE TELEPHONE COMPANY AND THE OWNER OF THAT PAY

1 TELEPHONE. AND OBVIOUSLY THAT'S A WAY FOR THE TELEPHONE
2 COMPANY TO ENCOURAGE PEOPLE TO HAVE PAY TELEPHONES AND TO OWN
3 MORE PAY TELEPHONES, WHICH ALSO RESULTS IN MORE PROFITS FOR THE
4 TELEPHONE COMPANIES.

5 NOW, THE SAME PRINCIPLE APPLIES IF YOU WERE TO GO
6 DOWNSTAIRS AND INSTEAD OF PUTTING 50 CENTS, MAYBE 75 CENTS BY
7 NOW, YOU GO DOWNSTAIRS, INSTEAD OF PUTTING MONEY IN THE
8 MACHINE, YOU CALL A TOLL FREE NUMBER, YOU CALL AN 800 NUMBER.
9 SO, OBVIOUSLY THAT CALL IS FREE TO YOU, BUT IT'S NOT FREE;
10 SOMEBODY IS PAYING FOR IT.

11 AND THE EVIDENCE IN THE CASE WILL BE THAT IT'S THE
12 SMALL BUSINESS, OR THE LARGE BUSINESS, OR WHOEVER IT IS WHO
13 OWNS THAT 800 NUMBER HAS TO PAY FOR THAT TELEPHONE CALL.

14 AND THE EVIDENCE WILL BE THAT THE AMOUNT THAT THEY
15 CURRENTLY HAVE TO PAY IS APPROXIMATELY 26 CENTS PLUS THERE MAY
16 BE SOME OTHER FEES ON TOP OF IT.

17 OKAY. NOW, ON THE SAME PRINCIPLE, JUST AS BEFORE
18 WHEN YOU PUT THE 50 CENTS IN THE PAY TELEPHONE AND THAT MONEY
19 WAS SPLIT BETWEEN THE TELEPHONE COMPANY AND THE PAY PHONE
20 OWNER, SAME THING WITH 800 NUMBERS. UNDER THE FCC, THE FEDERAL
21 COMMUNICATIONS COMMISSION, HAS MANDATED THAT 24 CENTS HAS TO BE
22 PAID TO THE OWNER OF THE PAY PHONE FOR EVERY 800 CALL THAT'S
23 MADE.

24 SO, THE MONEY EVENTUALLY GOES FROM THE PERSON WHO IS
25 CALLED, THAT HAS THE 800 NUMBER, THROUGH A SERIES OF STEPS,

1 LONG DISTANCE CARRIER, POSSIBLY SOME OTHER INTERMEDIARIES, BUT
2 ULTIMATELY, 24 CENTS IS SUPPOSED TO BE PAID TO THE PAY PHONE
3 OWNER.

4 SO THIS IS WHAT DANIEL DAVID DID ALONG WITH SCOTT
5 NISBET. DANIEL DAVID AND SCOTT NISBET LEASED AN OFFICE SPACE
6 IN SOUTH SAN FRANCISCO, AND THEN THEY CONTACTED PACIFIC BELL, I
7 SUPPOSE NOW SBC, AND THEY ORDERED 23 PAY PHONE LINES TO BE
8 HOOKED UP TO THAT EMPTY OFFICE SPACE IN SOUTH SAN FRANCISCO.

9 AND THE EVIDENCE WILL BE THAT IT WASN'T ACTUAL PAY
10 TELEPHONES AROUND THIS EMPTY OFFICE SPACE, BUT THEY'RE JUST PAY
11 TELEPHONE LINES, AND THAT THOSE LINES WERE THEN HOOKED UP INTO
12 THE JUNCTION BOX, WHICH PAC BELL HAS AT THAT BUILDING.

13 AFTER GETTING THE PAY PHONE -- THOSE ARE PAY PHONE
14 LINES. AFTER GETTING THOSE PAY PHONE LINES ROUTED INTO THAT
15 BUILDING IN SOUTH SAN FRANCISCO, DANIEL DAVID AND SCOTT NISBET
16 PURCHASED AN AUTODIALER FOR APPROXIMATELY \$15,000 FROM A
17 COMPANY IN WHITE PLAINS, NEW YORK AND THEY HOOKED UP THE
18 AUTODIALER, WHICH WAS CAPABLE OF MAKING SIMULTANEOUS AND
19 CONTINUOUS TELEPHONE CALLS ON A NUMBER OF LINES AT THE SAME
20 TIME. AND THEY HOOKED UP THAT AUTODIALER TO THE 23 PAY PHONE
21 LINES AND THEY TURNED IT ON AND LET IT RUN, AND THEY CALLED 800
22 NUMBER AFTER 800 NUMBER AFTER 800 NUMBER. AND FOR EACH 800
23 NUMBER THAT THEY CALLED, THEY COLLECTED OR WERE TRYING TO
24 COLLECT 24 CENTS PER CALL.

25 AND AS I SAID, THE EVIDENCE WILL SHOW THAT DANIEL

1 PAY PHONE CALL IS MADE TO THE 800 PERSON WHO, YOU KNOW, LIKE A
2 HOME DEPOT OR SOMEBODY -- ARE YOU WITH ME SO FAR?

3 A. YES, I AM WITH YOU. IT IS NOT MY -- I AM NOT THE BEST
4 PERSON TO ANSWER THAT.

5 Q. I AM TRYING TO UNDERSTAND IF WE ARE ON THE SAME PAGE.

6 A. YES.

7 Q. ASSUME IT GOES TO HOME DEPOT.

8 A. OKAY.

9 Q. I AM ASSUMING -- LET'S ASSUME THAT HOME DEPOT IS A CLIENT
10 OF AT&T. I AM ASSUMING WHAT HAPPENS HERE IS THAT HOME DEPOT IS
11 CHARGED APPROXIMATELY 26 CENTS FOR THAT CALL; IS THAT RIGHT?

12 A. YES.

13 Q. AND THAT WOULD BE THE 24 CENTS THAT IS GOING TO GO BACK TO
14 THE PAY PHONE OWNER, WHICH IS THE 79,000 THAT YOU ARE TALKING
15 ABOUT, AND THEN THERE IS AN OVERCHARGE -- NOT OVERCHARGE, I AM
16 SORRY, SURCHARGE THAT GOES TO AT&T FOR OVERHEAD; IS THAT RIGHT?

17 A. SEE, I CAN'T VERIFIED THAT BECAUSE THAT IS NOT MY REALM OF
18 EXPERTISE.

19 Q. WELL, DO YOU HAVE ANY IDEA WHAT THE 79,000 IS MADE UP OF?
20 WHERE DOES THAT MONEY COME FROM?

21 A. IT'S FROM CALLS TO TOLL-FREE CUSTOMERS.

22 Q. OKAY. AGAIN, IT IS BACK TO THE HOME DEPOT. WE WILL SAY
23 24 CENTS, FAIR ENOUGH? 24 CENTS IS CHARGED TO HOME DEPOT BY
24 AT&T; IS THAT FAIR?

25 A. YES, I GUESS. YEAH.

1 A. NO, I DIDN'T CHECK EACH ONE.

2 Q. DO YOU KNOW THAT ONLY BUSINESSES WERE CALLED, IN FACT,
3 THERE WASN'T EVEN ONE RESIDENCE THAT WAS CALLED?

4 A. NO, I DON'T KNOW. IN FACT, IT IS A GOOD LIKELIHOOD THAT
5 BOTH WERE CALLED.

6 Q. TELL ME WHY YOU SAY THAT?

7 A. BECAUSE APPROXIMATELY 80 PERCENT OF TOLL-FREE NUMBERS ARE
8 FOR BUSINESS AND ABOUT 20 PERCENT ARE FOR RESIDENCE.

9 Q. SO AT LEAST 20 PERCENT GO TO RESIDENCES OF THE 800 NUMBERS?

10 A. THAT'S AN ESTIMATE. RIGHT.

11 Q. WOULD YOU BE SURPRISED TO FIND THAT THERE IS NOT ONE SINGLE
12 CALL THAT WENT TO A RESIDENCE HERE? DO YOU FIND THAT UNUSUAL?

13 A. NO.

14 Q. I THOUGHT YOU JUST SAID THAT 20 PERCENT OF THE CALLS GO TO
15 RESIDENCES.

16 A. THAT'S AN ESTIMATE. IT COULD BE EVEN LESS THAN THAT.

17 Q. YOU DON'T KNOW --

18 A. I DON'T KNOW THE EXACT PERCENTAGE OF HOW MANY OF THE TOTAL
19 TOLL-FREE NUMBERS ARE RESIDENCES IN THE WHOLE UNITED STATES
20 THAT ARE AT&T'S AND HOW MANY ARE BUSINESSES.

21 Q. I AM SORRY, I AM TALKING ABOUT THE CALLS THAT WERE MADE BY
22 MR. DAVID AND MR. NISBET TO YOUR SUBSCRIBERS.

23 CAN YOU TELL ME THAT EVEN ONE OF THOSE CALLS WAS A
24 RESIDENCE?

25 A. I DIDN'T GO THROUGH EVERY SINGLE CALL OF THE HALF MILLION

(PICTURE TAKEN.)

THE CLERK: RAISE YOUR RIGHT HAND.

KEVIN OESTMANN,

CALLED AS A WITNESS FOR THE PLAINTIFF, HAVING BEEN DULY SWORN,
TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE CLERK: THANK YOU.

PLEASE STATE YOUR NAME FOR THE RECORD.

THE WITNESS: KEVIN OESTMANN.

DIRECT EXAMINATION

BY MR. JACOBS:

Q. MR. OESTMANN, GOOD AFTERNOON. CAN YOU SPELL YOUR NAME?

A. O-E-S-T-M-A-N-N.

Q. MR. OESTMANN, WHERE DO YOU LIVE?

A. CURRENTLY IN GILBERT, ARIZONA.

Q. AND ARE YOU FAMILIAR WITH A BUSINESS BY THE NAME OF MAIL
AND MORE?

A. YES, I AM.

Q. WHAT WAS YOUR RELATIONSHIP TO MAIL AND MORE?

A. I WAS THE OWNER.

Q. ARE YOU STILL THE OWNER?

A. NO, I AM NOT.

Q. WHEN DID YOU CEASE TO BE THE OWNER OF MAIL AND MORE?

A. I SOLD IT EFFECTIVE DECEMBER 8TH, 2003.

Q. DO YOU HAVE A NEW BUSINESS?

1 A. YES, I DO.

2 Q. WHAT IS THAT BUSINESS?

3 A. I AM CURRENTLY IN THE WINDOW COVERING BUSINESS.

4 Q. WINDOW COVERING?

5 A. WINDOW COVERINGS.

6 Q. HOW LONG DID YOU OWN MAIL AND MORE?

7 A. ABOUT TEN AND A HALF YEARS, FROM APRIL OF '93.

8 Q. WHAT IS MAIL AND MORE?

9 A. IT IS A MAILBOX PACKAGE AND SHIPPING STORE.

Q. WHERE IS IT LOCATED?

A. THE EXACT ADDRESS IS 9699 NORTH HAYDEN ROAD IN SCOTTSDALE,
ARIZONA.

Q. ARE THERE ANY OTHER LOCATIONS OF MAIL AND MORE OR JUST IN
14 SCOTTSDALE?

15 A. THERE ARE OTHER LOCATIONS.

16 Q. FOR YOUR STORE, THE ONE THAT YOU OWNED?

17 A. THAT WAS THE ONLY ONE I OWNED.

18 Q. WERE YOU EVER CONTACTED BY AN INDIVIDUAL WHO PURPORTED TO
19 BE WILLIAM JANSEN OR BILL JANSEN?

20 A. YES.

21 Q. WHEN WAS THE FIRST TIME THAT YOU WERE CONTACTED BY SOMEONE
22 SAYING THAT HE WAS WILLIAM JANSEN?

23 A. I BELIEVE IT WAS JUNE OF '98.

24 Q. AND WHAT WAS THE PURPOSE -- WAS IT A TELEPHONE CONTACT?

25 A. TELEPHONE CONTACT.

1 Q. WHAT -- WHY DID MR. JANSEN EXPLAIN THAT HE WAS CONTACTING
2 YOU AT MAIL AND MORE?

3 A. HE WANTED TO GET A MAILBOX SET UP IN ADVANCE OF COMING TO
4 ARIZONA, I BELIEVE.

5 Q. DID HE SAY ANYTHING ABOUT DOING ANY BUSINESS IN SCOTTSDALE?

6 A. POSSIBLY DOING BUSINESS OR JUST MOVING THERE. I AM NOT
7 SURE WHAT THE ORIGINAL CONVERSATION WAS.

8 Q. WAS IT ONE OF THOSE TWO THINGS?

9 A. ONE OF THOSE TWO THINGS, RIGHT.

10 Q. DID MR. JANSEN, EITHER IN THIS CONVERSATION OR ANY
11 SUBSEQUENT CONVERSATION, MENTION ANY OTHER INDIVIDUAL WHO WAS A
12 PARTNER OF HIS?

13 A. HE ASKED TO ALSO LIST THE NAME, THE MAIL MIGHT COME UNDER
14 THE NAME OF DAVE JACOBS.

15 Q. YOU SAID THIS FIRST CONTACT WITH THIS PERSON SAYING THAT HE
16 WAS WILLIAM JANSEN WAS OVER THE TELEPHONE.

17 LET ME ASK YOU, DURING THE ENTIRE COURSE OF YOUR
18 DEALINGS WITH MR. JANSEN OR DAVE JACOBS, DID EITHER OF THOSE
19 INDIVIDUALS EVER APPEAR IN PERSON AT MAIL AND MORE?

20 A. NO, THEY DID NOT.

21 Q. DID YOU EVER MEET PERSONALLY EITHER AT MAIL AND MORE OR
22 ANYWHERE ELSE EITHER ONE OF THOSE TWO INDIVIDUALS?

23 A. NO, I DID NOT.

24 Q. DID YOU, IN FACT, PROVIDE A MAILBOX TO MR. JANSEN?

25 A. YES, I DID.

(PICTURE TAKEN.)

THE CLERK: RAISE YOUR RIGHT HAND.

CARA MCMILLAN,

CALLED AS A WITNESS FOR THE PLAINTIFF, HAVING BEEN DULY SWORN,
TESTIFIED AS FOLLOWS:

THE WITNESS: YES, I DO.

THE CLERK: THANK YOU.

PLEASE STATE YOUR FULL NAME FOR THE RECORD.

THE WITNESS: MY NAME IS CARA MCMILLAN.

THE CLERK: CARA?

THE WITNESS: CARA, THAT'S CORRECT. C-A-R-A
M-C-M-I-L-L-A-N.

DIRECT EXAMINATION

BY MR. PARRENT:

Q. MS. MCMILLAN, BY WHOM ARE YOU EMPLOYED?

A. I AM A MEMBER OF THE ROYAL CANADIAN MOUNTED POLICE
PRESENTLY STATIONED IN SURREY, BRITISH COLUMBIA.

Q. HOW LONG HAVE YOU BEEN A MEMBER OF THAT POLICE FORCE?

A. COMING UP TO FOURTEEN YEARS.

Q. ARE YOU BEEN EMPLOYED IN A PARTICULAR SECTION OF POLICE
FORCE?

A. YES. I AM EMPLOYED WITH THE VANCOUVER COMMERCIAL CRIME
SECTION.

Q. NOW, AS PART OF YOUR DUTIES WITH THE RCMP, DO YOU HAVE
ACCESS TO THE DRIVER'S LICENSE RECORDS FOR THE PROVINCE OF

1 Q. NOW, DID THE RECORDS INDICATE THAT THE NAME OF THE CUSTOMER
2 RESPONSIBLE FOR THOSE LINES WAS CHANGED AT SOME DATE?

3 A. YES, THERE WAS A SUPERSEDURE.

4 Q. WHAT IS A SUPERSEDURE?

5 A. IT'S AN ORDER TO TAKE THE ACCOUNTS OUT OF ONE NAME, ONE
6 BILLING RESPONSIBILITY AND PUT IT TO ANOTHER BILLING
7 RESPONSIBILITY.

8 Q. WITH THE SUPERSEDURE, DID IT KEEP THE SAME BUILDING ADDRESS
9 AND PAY PHONE LINE LOCATION?

10 A. YES.

11 MR. PARRENT: YOUR HONOR, MAY I APPROACH THE
12 WITNESS?

13 THE COURT: YOU MAY.

14 BY MR. PARRENT:

15 Q. MS. GROSSMAN, I AM SHOWING YOU WHAT HAS BEEN MARKED
16 GOVERNMENT 17 FOR IDENTIFICATION.

17 DO YOU RECOGNIZE THAT DOCUMENT?

18 A. I DO.

19 Q. WHAT IS IT?

20 A. IT'S A SUPERSEDURE FORM CHANGING THE LINES LISTED AT THE
21 TOP TO BREEZE COMMUNICATIONS.

22 Q. ALL RIGHT.

23 MR. PARRENT: YOUR HONOR, I MOVE TO ADMIT GOVERNMENT
24 17.

25 THE COURT: ANY OBJECTION?